An Emphatic Scrutiny of the Ḥanafī Juristic Approach on the Consent of Guardian in the Adult Muslim Women Marriage

Mariam Hafeez*

Abstract

The marriage of an adult Muslim woman without her guardian's consent, especially of the woman who has no previous experience of marriage (adult Muslim virgin woman), has been an issue of great concern in Pakistan. Commonly discussed under the term of 'court marriage', there is astonishingly no statutory law over this issue. The issue was first highlighted in the family courts in early 1980s and due to lack of any clear statutory ruling on the case, it was settled through precedential laws. The judges in various cases (details would be irrelevant here) have apparently declared such marriages to be absolutely valid, under the Ḥanafī law regarding the issue. The research paper at hand aims to explore the classical Ḥanafī law and its complete juristic approach regarding the issue. The *Sharīʿah* analysis of the rulings regarding the marriage conducted by an adult virgin woman without obtaining her guardian's consent has revealed that the honorable courts of Pakistan have adopted the method of selective interpretation and implementation of Ḥanafī law. They have disregarded two important factors of *kafā'ah* (suitability of spouse) and *mahr al-mithl* (equal dower), which if overlooked, turn the marriages into invalid, that is, irregular ones (*fāsid*). The current research paper strives to explore the classical *fiqhī* rulings concerning the conclusion of marriage contract, its validity conditions, pre-requisites, extent of capacity of adult women in its conduction, legal concepts of *kafā'ah* and *mahr al-mithl*, in order to clarify the ambiguities and misconceptions regarding these concepts and their consequent implementation.

Keywords: Marriage, Adult Muslim Woman, Ḥanafī law, *fiqh*, Guardian, Consent, *Kafā'ah, Mahr al-mithl*

1. Introduction

The *nikāḥ* or marriage contract has a vital role and significance in Islamic jurisprudence. Almost half of the legal concepts in Islam revolve around the central focal point of family laws, the essence of which is marriage. Thus, marriage being the major constituent of family laws in Islam needs to be free of all ambiguities and irregularities. As per its status, a marriage may be valid or invalid. The later may further be either irregular (*fāsid*) or void (*bāṭil*), and both are prohibited marriages in their essence, with little difference in their legal implications. Accordingly, the *bāṭil* marriage is the one which is invalid ab-initio and can never be validated in any situation whereas the *fāsid* marriage bears some irregularity based on some temporary impediment or unlawful condition, which if removed, validates the marriage contract. The ideal valid marriage is the one which comprises all the requisites and conditions in a complete manner. Some of the fundamental conditions which must be fulfilled are known by the sources of Islamic law to be offer & acceptance, parties, specification of dower, witnesses, and consent of the guardian.[1] There are many other conditions as well which the scholars recommend being met for concluding a perfect marriage contract.

In regard to guardians' consent, there is a controversy among the jurists upon the condition of his consent, for the validity of *nikāḥ*. In this regard, Imām Mālik and Imām Shāfiʿī are of the view that there is no marriage without a guardian[2] and the validity of *nikāḥ* rests on the permission of the guardian.[3] Imām Aḥmad bin Ḥanbal also supports the

[1]Jamal J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman Ltd., 1990), 53-54.

[2]Qāḍī Abū'l Walīd Muhammad bin Ahmad ibn Rushd Mālikī Al Qurtabī, *Bidāyatul Mujtahid* (Saudia: Maktabatul Ma'ārif lil Nashar wa Al-tauzī', 1998), 2:6-7.

[3]Imām Nawawī, *Sharaḥ Muslim* (Egypt: Matba' Misriyyah bil Azhar, 1929), 9:205.

same view.[4] Ibn-e-Ḥazam, Ibn-e-Taymīyah, Ibn-e-Qudāmah and many others are also of the same view.[5] On the other hand, Imām Abū Ḥanīfah has a different opinion. According to him, an adult virgin woman has the right to conclude her own marriage contract without the consent of her guardian, who in his view acts only as an advisor to the female and shares in her decision making.[6] But it is pertinent to note that Imām Abū Ḥanīfah restricts this right with two conditions, that is, the chosen husband must be suitable and equivalent (*kufw'*) to the adult virgin woman[7] and the dower must not be less than that appropriate for her (*mahr al mithl*).[8] The guardian under the Ḥanafī law can annul his ward's marriage through the court of law, if she has chosen an ineligible or unsuitable husband unless pregnancy has been established. The Ḥanafī jurists have mentioned a number of verses for authenticating their view.[9]

The Family Laws about the issue of guardians' consent in Pakistan do not explicitly provide any permission to adult women to marry without the consent of the guardian. Nevertheless, the precedential laws have set the rule that if a woman marries without the consent of her guardian, the marriage contract shall be validated.[10] The only source of validating the marriage of adult virgin women without the consent of the guardian in

[4] Susan A. Spectorsky, *Chapters on Marriage and Divorce: The Guardian (Wali)* (Austin: University of Texas Press, 1993), 12.

[5]Islam the Complete System of Life, *There is no Marriage without the Consent of Guardian*, Available at http://www.systemoflife.com/articles/general/142-there-is-no-marriage-without-the-consent-of-guardian#axzz3uqWU0kpH, Accessed 09 Sep, 2016.

[6]ʿAlā' al-Dīn Abū Bakr bin Masʿūd al-Kāsāni*, Badā'iʿ al-Ṣanā'i 'fī Tartīb al-Sharā'iʿ*, (Karachi: Educational Press, 1979), 2:247-249.

[7] Wahbatu'l Zahīlī, *Al-Aḥwāl al-Shakhsiyyah* (Syria: Dār Al Fikr, 1984), 7:186-192.

[8]Abī Al-Hassan Alī bin Abī Bakar bin Abdul Jalīl Al-Marghinānī, *Al-Hidāyah* (Riyadh: Al-Maktabah Al-Islāmiyyah), 1:202.

[9]Muhammad Tāhir Mansūrī, *Family Law in Islam (Theory and Application)* (Islamabad: Shariah Academy, International Islamic University, Islamabad, 2012), 58-62.

[10]See Muhammad Imtiaz vs. State, PLD 1981 FSC 308; Abdul Waheed vs. Asma Jahangir, PLD 1997 Lahore 301. [There are many other cases as well].

Pakistan is the precedents set by case laws. The judges have apparently set this rule according to the prevailing school of thought in Pakistan, that is, the Ḥanafī school of thought. But they have overlooked the actual and complete rulings of the Ḥanafīs regarding this issue. The requisite of the two specified conditions is entirely ignored. Adult women marriages are absolutely declared valid without scrutinising the presence of equality (*kufw'*) and appropriate dower (*mahr al mithl*).

This research paper, therefore, explores the classical *fiqhī* rulings of the four *sunnī* schools of thoughts, particularly the Ḥanafī school of thought regarding the conditions of marriage, role of guardian in the marriage of those not independently capable of their own marriage and specifically the validity status of the marriage conducted by an adult virgin woman without the consent of her guardian. This analysis and representation of the traditional and authentic *fiqhī* rulings concerning the issue at hand shall not only be helpful in cognizance of the actual classical rulings regarding the status of *sui juris* women's marriage but shall also be beneficial in scrutinizing and identifying the paucities, discrepancies and misconstruing in the application of these rulings in the Pakistan's Courts of law.

2. Pre-requisites and Conditions of Marriage Contract in Islamic Law

Jurists have explained certain prerequisites related to the capacity of contracting parties, form of contract, elements etc. which have to be fulfilled for the conduction of a valid marriage contract. Lack of any of these prerequisites invalidate the marriage contract. Further, having due acquaintance of the conditions relevant to the validation of marriage contract is quite crucial in order to comprehend the concept completely. These are divided into four kinds: conditions of convening/formation (شروط

الإنعقاد), conditions of validity (شروط الصحة), conditions of efficacy (شروط النفاذ), and conditions of irrevocability (شروط اللزوم).

2.1 The Conditions of Convening or Formation

The conditions of convening or formation are essential for the foundation of the marriage contract. Thus, if the contract lacks or contradicts any such condition of formation, the contract is void (*bāṭil*) according to the consensus of the four major *sunnī* schools of thought.[11] This genera of conditions pertain to the legal capacity of contracting parties, that is, bridegroom and bride (أهلية التصرف), listening to the words of other contracting party, parties not being in any prohibited degree relation (temporary or permanent) with each other, and the conditions of conducting terms, offer and acceptance (الإيجاب و القبول).[12] For instance, same sitting place, concurrence between the offer and acceptance regarding the subject matter of contract, non-revocation of the offer before acceptance and conduction using the past or present tense.

As far as the capacity of contracting parties is concerned, the general necessities for them to enter into a marriage contract in Islam are to be Muslim, of sound mind and must have attained the majority age.[13] Among the mentioned capacity conditions, many jurists also add the condition of

[11]Wahbatu'l Zahīlī, *Al-Fiqh al-Islāmī wa Adillatuhu* (Damascus: Dār al Fikr, 1989), 7:47.

[12]Muhammad Amīn al-Shahīr Ibn Abidīn, *Radd ul Mahtār 'alā al-Durr ul Mukhtār* (Quetta: Al-Maktabah al-Mājidiyyah, 1979), 2:285.

[13]Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (New Delhi: Oxford University Press, 1970), 93.

being free and not a slave.[14] But the marriage contract of a slave or concubine establishes validly with the consent of the lord.[15]

Similarly, the lunatics and the minor persons cannot enter into a marriage contract, but their respective guardians can conduct the contract on their behalf. Moreover, it is very necessary that the parties must be capable of providing their consent because even if the parties have reached the puberty age and are of sound mind but have not given their consent to the contract, the marriage is void.[16]

The jurists show consensus upon presence of 'offer and acceptance' to be the basic element of *nikāḥ* with the condition that the consent of both the parties must be free of any coercion unlike Imām Abū Ḥanīfah. Imām Abū Ḥanīfah considers "offer and acceptance" to be the sole element necessary for the conduction of marriage contract. The dower is not the element of contract conduction as it is misunderstood, but it is a condition or requirement of the contract. It means that it is not a prerequisite without which a contract cannot be formed, but it is a condition incumbent upon the husband to fulfil after the conduction of contract.[17]

2.2 The Conditions of Validity

The conditions of validity are those, the presence of which is necessary to implement the impacts of *sharīʿah* rulings on the contract. For instance, the terms used for the contract formation must not connote temporariness; presence of witnesses, consent of parties and absence of coercion etc. are

[14]Imām Shams al-Dīn Muhammad al-Shirbīnī al-Khāṭib, *Mughnī al-Muḥtāj ilā Ma'rifat al-Ma'ānī Alfāẓ Sharḥ al-Minhāj* (Egypt: Maktabah wa Maṭba' Muṣṭafā al-Bābī al-Ḥalabī, 1985), 3:171.

[15]Muhammad Zakī Abdul Barr, *Tuḥfatu'l Fuqahā* (Cairo: Maktabah Dār ul Turāth, 1998), 2:179.

[16]Abdullah bin Mahmood bin Mawdūd Al-Mawṣalī Al-Ḥanafī, *Al-Ikhtayār li Ta'līl Al-Mukhtār* (Istanbul: Dār'l Farās lil Nashar wa Al-Tawzī', 1987), 1:85.

[17]Ibid, 83.

the conditions of the validity of the marriage contract. Thus, if the contract lacks or contradicts any of these conditions of validity, then the contract according to Imām Abū Ḥanīfah is irregular (*fāsid*) and according to the majority jurists (*jumhūr*), that is, Imām Shāfiʿī, Imām Mālik and Imām Aḥmad bin Ḥanbal, it is void (*bāṭil*).[18]

2.3. The Conditions of Efficacy

The conditions of efficacy are those on which the practical execution of the contract is dependent, after its valid formation. For example, the wife and husband must have achieved complete legal capacity to effectuate the implications of the contract; if the contract is conducted by an authorized agent, he should not contradict the principal's directions about the bridegroom, dower etc. and certain other examples. If the contract lacks or contradicts any of these conditions, then the contract remains contingent (*mauqūf*) according to the Ḥanafīs and Mālikis.[19]

2.4 The Conditions of Irrevocability

The conditions of irrevocability are the conditions on which the continuity and the endurance of the contract rely. Thus, if any condition in the contract is contrary to these, the contract becomes "binding" or "non-binding". This situation allows any of the contractors or third authoritative person to waive off the contract.[20] Irrevocability of contract means that the contractors have no right to waive the contract after its formation as the contract no longer remains an option for them. For instance, if the guardian arranged the marriage of the legally incapable person (like mad or minor) was his/her father or grandfather, then according to Imām Abū Ḥanīfah and Imām

[18] Zahīlī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7:47.
[19] Ibid.
[20] Ibid.

Muḥammad, the contract becomes irrevocable. But if the guardian was some other person like the brother or uncle, then upon the dissolution of the incapability, that is, gaining soundness or majority, the ward shall be given the option of waiving the contract. Similarly, according to the Ḥanafīs, if the woman married herself without the consent of her guardians but her husband is equivalent (*kufw'*) to her, the contract becomes irrevocable. But if the husband is not *kufw'*, then the guardian has the right to demand revocation of the contract from the *qāḍī*.

3. Forms of Marriage Contract with regard to their Validity

The jurists have divided the marriage contract into three types with regard to their validity and non-validity. A valid (*ṣaḥīḥ*) contract is the one which fulfils all the elements, intrinsic and extrinsic conditions of marriage, ordained by the jurists. A valid marriage contract, being in accordance with the requirements of *sharīʿah*, will give rise to all the legal effects, that is, the establishment of paternity and legitimacy of the children, mutual inheritance entitlement of the spouses, and maintenance of wife etc.

Invalid (void (*bāṭil*)) contract is the one which does not incur any effects of a valid contract;[21] thus, effectuating no legal consequences of a marriage even if the sexual relationship has been established between the contractors. It will be amounted to nullity and hence spouses will not have permissible physical access to each other, paternity and legitimacy of the children will not be established, the spouses will not inherit from each other, the woman will not be entitled to maintenance, dower and all the other effects of marriage will not be executable in case of a void marriage. The spouses can be accused of adultery in this form of contract. For instance, the marriage contract conducted within the prohibited degree relations like

[21]Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence (Uṣūl al-Fiqh)* (Islamabad: Center for Islamic Law and Legal Heritage, 2002), 191.

with sister or daughter, or marriage contract with a woman who is already in a marital bond of another man is a void (*bāṭil*) marriage.[22]

Irregular (*fāsid*)) contract incurs certain effects of a valid contract according to the Ḥanafīs;[23] hence if a sexual relationship is established in an irregular marriage contract, certain effects of marriage are executed. Thus, the lineage of the children is ascertained, they are entitled to the parents' inheritance and the waiting period becomes incumbent on the woman. The spouses cannot be punished for *zinā'* if they have conducted an irregular marriage. The instances of irregular (*fāsid*) marriages include marriages without witnesses, temporary marriages, marriage with wife's sister during continuity of marital bond with the wife or during her waiting period (*ʿiddah*) etc.[24] On the other hand, an irregular marriage also entails some effects of a void marriage, that is, the spouses do not inherit from each other, the wife is not entitled to maintenance, and separation is incumbent upon them etc.

4. Guardianship in Marriage

Guardianship or *wilāyah* refers to the legal authority consigned to a person who is fully competent to protect and safeguard the rights and interests of another person who is incapable of independently doing so. In the context of marriage, a *walī* or guardian is someone who has been granted the authority to arrange the marriage or consent to it on behalf of another person. Generally, the guardian is essential for the conduction of marriage of minor male and female children. But for adult or major contractors, the presence of a guardian is usually deemed as a necessary condition for an

[22]Abī Muhammad 'Abdullah bin Aḥmad bin Muhammad bin Qudāmah al Muqdasī, *Al-Mughnī* (Cairo: Maktabah al-Kulīyāt al-Azhariyyah, 1969), 6:456.

[23]Nyazee, *Outlines of Islamic Jurisprudence*, 73.

[24]Ibid, 275.

adult woman only and not for a male. The concept of guardianship has been enunciated in a number of Qurā'nic verses.[25] Guardianship has been divided into different types by the jurists. The nature and essentials of these types are also elaborated.

4.1 Compulsory Guardianship (ولاية ايجاب)

Compulsory guardianship, also referred to as *wilāyah ijbārīyyah*, consigns such an authority by which the guardian can conduct the marriage contract of his ward without his/her consent. The wards on which such guardianship can be exercised might be minor boy, minor girl whether virgin or deflowered (difference of jurists' opinions exists), insane major man, insane major woman, minor slave and virgin concubine.[26] The Ḥanafīs do not extend compulsory guardianship on the *bāligh* (major) virgin woman but the Mālikīs and Shāfiʿīs authorise the father with *wilāyah ijbārīyyah* stating that he can force the *bāligh* virgin woman into a marriage contract. Imām Abū Ḥanīfah and Imām Mālik are of the opinion that the father can force *ghayr-bāligh* deflowered woman to marry whereas the Shāfiʿīs state that the deflowered woman may she be a major or minor cannot be forced by the guardian to marry.[27] But the Shāfiʿīs permit the guardian (only father or grandfather) to marry an insane woman under *jabr*, no matter whether she is a minor or adult, virgin or deflowered, provided that the marriage is in her interest.[28]

However, the basis of compulsory guardianship lies on the concern for the interest of the persons who have limited or no legal capacity. So, the

[25]Al-Qur'ān, 2:25; 4:25; 2:32.

[26] Al-Kāsāni, *Badā'i' al-Ṣanā'i*, 2:241.

[27]Ibn Rushd, *Bidāyat al- Mujtahid wa Nihāyat al- Muqtaṣid*, tr. Imran Ahsan Khan Nyazee, *The Distinguished Jurist's Primer* (United Kingdom: Garnet Publishing Ltd., 2000), 2:5.

[28]Abū Isḥāq Ibrāhīm bin Alī bin Yūsuf Al-Shīrāzī, *Al-Muhdhib fī fiqh Al-Imām Al-Shāf'ī* (Beirut: Dār al-Kutub ul 'Ilmiyyah, 1999), 2:430.

purpose of this authority is no other than the promotion of their welfare. The judge or the *qāḍī* reserves the right to disqualify the guardian who is proved to contract against the welfare of his ward or has harmed his/her interests or causes unjustified prevention to his/her marriage. Moreover, the guardian while exercising compulsory guardianship does not have the right to give his ward in marriage to someone who is not his/her equal (*kufw'*) or with a dower less than the appropriate dower.[29]

Commonly, the right of compulsory guardianship can merely be exercised by the males related to the ward through lineage such as his father, paternal grandfather, paternal uncle, brother or son. However, the jurists differ over the limit and precedence of these guardians. Imām Abū Ḥanīfah and Imām Muḥammad are of the opinion that the ward whose marriage was conducted in minority or insanity under compulsory guardianship has the option of puberty (*khiyār al-bulūgh*) or sanity and can ratify or revoke his/her *nikāḥ* on attaining majority or sanity, if it was conducted by a guardian other than the father and the grandfather. Imām Abū Yūsuf negates the existence of any such option by analogising the guardians of father and grandfather.[30]

4.2 Recommended Guardianship (ولاية ندب و استحباب)

Recommended guardianship is only recognised by Imām Abū Ḥanīfah and Imām Abū Yūsuf, whereas Imām Muḥammad among the Ḥanafīs does not accept this type of guardianship. According to the proponents of this type of guardianship, the guardian is vested with *wilāyah ijbārīyyah* to act as a representative of the ward due to his/her deficient legal capacity to conduct

[29]Dawoud S. El Alami, "Legal Capacity with Specific Reference to the Marriage Contract", *Arab Law Quarterly* 6:2 (1991): 190-204.

[30]Burhān al-Dīn al-Farghānī al-Marghinānī, *Al-Hidāyah: The Guidance*, trans. Imran Ahsan Khan Nyazee, (Rawalpindi: Federal Law House, 2015), 2:753.

a contract. But when this deficiency or inability is removed through sanity or maturity, the reason for *jabr* also ceases to exist. Hence, the inability left with the female ward is only the recommendation that she should not go out to mix in the male occupied areas. The demand of *sharīʿah* from the adult woman regarding avoidance of exit to places where men are in abundance is of recommendable nature and not a legal obligatory prohibition or inability. Hence, according to Imām Abū Ḥanīfah and Imām Abū Yūsuf, the adult virgin woman's guardian possesses recommended guardianship, that is, it is commendable that she must get married with the consent of her guardian, but if she marries herself, the marriage is deemed valid provided that she chooses an equal spouse, paying appropriate dower.[31]

The essence of this type of guardianship is that the guardian must take the consent of an adult virgin woman before conducting her marriage and if he does not do so, the marriage is not considered valid. It is commendable for the adult virgin to delegate her matter to her guardian but if she marries herself without his consent, the marriage still is not invalid (provided that the prerequisites are fulfilled).[32] The deflowered women (widow or divorced) are also dealt under recommended guardianship by the Ḥanafīs. Imām Muḥammad of the Ḥanafī law does not consider the marriage of a virgin woman conducted by herself without her guardian's consent to be concluded; rather he declares it suspended (*mauqūf*) upon the ratification of the guardians' consent.[33] The Mālikīs, Shāfiʿīs and Hanābilah do not recognize this type of guardianship and do not validate the marriage of an adult virgin conducted without her guardian's consent.[34]

[31]Al-Kāsāni, *Badā'i' al-Ṣanā'i,* 2:242.

[32]Ibn 'Abidīn, *Radd al-Mahtār 'alā Ad-Durr al-Makhtār* (Beirut: Dār al-Fikr, 1992), 3:55.

[33]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:746.

[34]Al-Imām Kamāl ul-Dīn Muhammad bin 'Abd al-Wāhid, *Sharaḥ Fataḥ al-Qadīr lil 'Ājiz al-Faqīr* (Beirut: Dār Iḥyā' al-Turāth al- 'Arabī, 1930), 3:157.

4.3 Complementary Guardianship (ولاية شركة)

Complementary guardianship is approved by Mālikī, Shāfiʿī and Ḥanbalī Schools and Imām Muḥammad of the Ḥanafī School also supports this type of guardianship. Complementary guardianship denotes the necessity of mutual consent of both the guardian and the ward. Under this guardianship, neither the guardian can force the ward to marry without her permission nor can the ward marry herself without the guardian's consent.[35] Marriage of a deflowered woman is an instance of this guardianship. The guardian cannot force a deflowered female ward into the marriage contract and if he does so, the contract remains contingent upon her consent, that is, if she agrees, the contract is established and if she refuses to consent, the contract is considered invalid.[36] The consent of the deflowered woman cannot be inferred from her silence; rather she has to speak up words expressing her consent.[37]

Whatever kind of guardianship it may be, the guardian is always bound to hold the marriage contract in the interest of the ward and avoid any harm that might undermine her welfare. Almost all the *sunnī* and *shīʿah* Schools of thought insist that the guardian should preferably marry the ward to her *kufw'*. In some cases, lack of *kafā'ah* is even considered a ground for annulment of *nikāḥ*. The discussion of *kafā'ah*, its elements and its necessity is indispensable in this context.

[35]Aayesha Rafiq, "Role of Guardian in Muslim Woman's Marriage: A Study in the Light of Religious Texts", *IJISET - International Journal of Innovative Science, Engineering & Technology* 2:4 (2015): 1254-1261.

[36]Al-Kāsāni, *Badā'i' al-Ṣanā'i*, 2:242.

[37]Muhammad bin Ahmad bin Abī Sahal al-Sarakhsī, *Al-Mabsūṭ* (Karachi: Idāratul Qurān wal 'Ulūmul Islāmiyyah, 1987), 5:10.

5. Kafā'ah: Suitability between Spouses

Kafā'ah literally means similarity and equality whereas in the jurists' terminology, it refers to the suitability and compatibility between the spouses that avoids inconvenience in specific matters and is credible from the bridegroom's perspective (in context of the marriage contract).[38] This is because the man has to set up cohabitation and will not be offended by the low status or origin of the woman whereas on the contrary, the status of the man affects the woman's cohabitation.[39] Hence, the marriage is considered unequal or *ghayr-kufw'* if the husband's status is inferior to that of the wife's family in various aspects including certain personal qualifications. The wife's inferior status does not amount to inequality because she acquires the husband's status and hence no injury is caused to his standing. Moreover, the lineage of the children is counted from the husband's side and the inferiority of the wife causes no adverse effects upon either of the families. So, the husband cannot seek relief on the basis of inequality, if his wife had deceived him in this respect.[40] This relief can only be granted to the husband if he was married under *wilāyah ijbārīyyah* in his minority and his guardian had fixed on his behalf a dower much higher than the customary dower of the wife's family.[41]

5.1 Basis of *Ikfā'ah*: The Doctrine of Equality

The doctrine of *kafā'ah* finds its roots in various traditions of the Holy Prophet ﷺ and sayings of the companions. Some of them are mentioned

[38]'Abd al-Rahmān bin Muhammad bin Sulaymān Afandī, *Majma' al-Anhar fī Sharaḥ Multaqī al-Abḥar* (Beirut: Dār'l Iḥyā' al-Turāth al- 'Arabī, n.d.), 1:339.

[39]Zayn ud Dīn bin Ibrāhīm bin Muhammad ibn Najīm al-Misrī, *Al-Baḥr al-Rayq Sharaḥ Kanz al-Daqayq* (Cairo: Dār Kitāb al-Islāmī, 1997), 3:137.

[40] K.N. Ahmed, *The Muslim Law of Divorce* (New Delhi: Kitab Bhavan, 1984), 307.

[41]Ibn 'Abidīn, *Radd al-Muhtār 'alā Ad-Durr al-Mukhtār* (Beirut: Dār'l Iḥyā' al-Turāth al- 'Arabī, 1987), 2:326.

here to authenticate the basis of this doctrine as Ḥaḍrat ʿĀʾisha narrates from the Holy Prophet Muḥammad (PBUH) that:

> عَنْ عَائِشَةَ قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: تَخَيَّرُوا لِنُطَفِكُمْ، وَانْكِحُوا الْأَكْفَاءَ، وَأَنْكِحُوا إِلَيْهِمْ.
>
> Select (fit) woman (in respect of character) for your seed (generation) and marry (your) equals and give (your daughters) in marriage to them.[42]

In another *ḥadīth*, Jabir narrates from the Prophet Muḥammad that he said:

> قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: لَا تُنْكَحُ النِّسَاءُ إِلَّا مِنَ الْأَكْفَاءِ، وَلَا يُزَوِّجُهُنَّ إِلَّا الْأَوْلِيَاءُ، وَلَا مَهْرَ دُونَ عَشَرَةِ دَرَاهِم.
>
> Do not marry the woman except with their equals, and do not marry them except by their guardians, and no dower (is acceptable if less than) ten *dirhams*.[43]

In another place,

> عَنْ مُحَمَّدِ بْنِ عُمَرَ بْنِ عَلِيِّ بْنِ أَبِي طَالِبٍ، عَنْ أَبِيهِ، عَنْ جَدِّهِ، أَنَّ رَسُولَ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ لَهُ: يَا عَلِيُّ ثَلَاثَةٌ لَا تُؤَخِّرْهَا الصَّلَاةُ إِذَا أَتَتْ، وَالْجِنَازَةُ إِذَا حَضَرَتْ، وَالْأَيِّمُ إِذَا وَجَدَتْ كُفُؤًا.
>
> Muḥammad bin ʿUmar bin ʿAlī bin Abī Ṭālib reports from his father that his grandfather narrated that the Prophet Muḥammad stated: O ʿAlī! Do not procrastinate three things; the prayer when (its time) enters, the funeral when it arrives

[42]Ibn Mājah, *Sunnan*, Hadīth no. 1968.

[43]Abū al-Qāsim al-Ṭibrānī, *Al-Mu'jam al-Awsaṭ* (Cairo: Dār al-Haramayn, 1994), 1:6.

> and the unmarried women (for marrying them) when their equal (spouse) is found.[44]

It has been reported by the narrators that the companions of the Prophet also emphasized on the maintenance of equality and compatibility between the spouses.

5.2 Factors involved in Equality (Kafā'ah)

The jurists of the *sunnī* School of thought differ as to what amounts to inequality between the spouses. The factors which each school of thought has specified to essentially be the constituents of equality are mentioned separately.

The jurists of the Ḥanafī school are found to be more exacting in respect of *kafā'ah* as compared to the jurists of other schools. According to them, *kafā'ah* in marriage appertains to the following factors or matters: *dīn* (religion), *nasab* (lineage), *ḥurriyah* (freedom from slavery)[45], *ḥirfah* (profession), *diyānah* (piety or character)[46] and *māl* (financial condition or property).

The jurists of the Mālikī School differ from the Ḥanafīs with regard to the concept of inequality. The only factors that constitute equality between the spouses, according to them, are Islam, piety and means to maintain the wife. They do not consider the matters of lineage and profession significant in *kafā'ah*.[47] There is a difference in reports about the opinion of Mālikīs regarding the factor of freedom as to whether it is

[44]Bayhaqī, *Al Sunnan Al-Kubrā*, Hadīth no. 13757.

[45]Al-Sarakhsī, *Al-Mabsūṭ*, 5:24-25.

[46]Burhān ud Dīn Mahmūd bin Ahmad al-Bukhārī al-Marghinānī, Al-*Muḥīṭ al-Burhānī fil Fiqh al-Nu'mānī Fiqh al-Imām Abī Ḥanifā* (Beirut: Dār'l Kutub ul- 'Ilmiyyah, 2004), 3:23.

[47]Muhammad bin Ahmad bin 'Arfah Al-Dasūqī Al-Mālikī, *Ḥāshīyat ul Dasūqī 'alā al-Sharḥ al-Kabīr* (Beirut: Dār al-Fikr, n.d.), 2:250.

considered to be an element of equality or not. Some reports do not present it as a condition of equality in the opinion of Mālikīs. But there are narrations which add it as an essential factor[48] along with the condition that the husband must be free of certain defects[49] like leprosy, leukoderma and insanity.

Shāfiʿīs put forth almost the same factors for equality between spouses as those stipulated by Imām Abū Ḥanīfah. There is only one difference, that they do not specify *māl* or property as a condition for equality.[50] However, the Shāfiʿīs add that the existence of certain defects in the husband would count as a ground for inequality.[51] Hence, the conditions set by the Shāfiʿīs for equality in marriage can be summarised as *Islām*, *nasab*, piety, *ḥurriyah*, *ḥirfah* (profession) and being free from certain physical defects.[52]

It is also reported in some narrations that the Shāfiʿīs consider the factor of the age also as a condition for equality, that is, there should not be very extensive age difference between the spouses such that one of them is in old age and the other in childhood or so. This unusual difference defeats the purpose of marriage and reduces the attraction between the spouses. So, it becomes a factor of inequality if the age difference is of such an uncharacteristic nature.[53]

---

[48]Ibid, 249.

[49]Abū al-Walīd Muhammad bin Ahmad bin Muhammad ibn Ahmad bin Rashd al-Qurtabī al-Undlasī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Cairo: Dār al-Ḥadith, 2004), 3:3.

[50]Abū al-Hassan ibn al-Maḥāmalī al-Shāf'ī, *Al-Lubāb fi Fiqh al-Shāf'ī* (Madīnah: Dār ul Bukhārī, 1995), 1:303.

[51]Abū al-Ḥussain Yahyā bin Abī al-Khayr bin Sālim al-Imrānī al-Shāf'ī, *Al-Bayān fi Madhab Al-Imām Al-Shafi'ī* (Jaddah: Dār ul Minhāj, 2000), 9:203.

[52]Abdul Malik bin Abdullah bin Yusūf bin Muhammad Al-Juwaynī, *Nihāyat al-Maṭlab fi Dirāyat'l Mudhib* (Jaddah: Dār ul Minhāj, 2007), 12:153.

[53]Abū al-Hassan Alī bin Muhammad bin Muhammad bin Ḥabīb al-Baṣrī al-Baghdādī, *Al-Ḥāwī Al-Kabīr fi Fiqh Madhab al-Imām al-Shāf'ī wa huā Sharaḥ Mukhtāṣir al-Muznī* (Beirut: Dār Kutub ul- ʻIlmīyyah, 1999), 9:106.

The opinions expressed by Imām Aḥmad bin Ḥanbal regarding equality in marriage are various. One of the opinions of Imām Aḥmad bin Ḥanbal is reported to have prescribed only two conditions for *kafā'ah*; *dīn* or religion and *nasab* or lineage.[54] In another opinion, Imām Aḥmad bin Ḥanbal is reported to have stipulated five conditions for equality in marriage. Two of the conditions mentioned are the same as that of the first opinion, that is, religion and lineage; and the other three being freedom from slavery, profession and wealth. According to this opinion, it is not allowed to marry a free woman to a slave, a daughter of a merchant to a barber and a rich woman to a poor man.[55]

In this opinion, they added that the absence of other factors like freedom, profession and wealth do not invalidate the marriage contract. The two factors religion and lineage create the actual harm in marital perspective. But the equality in lineage is relevant from the woman's aspect only and does not apply to the man, that is, if the wife is of lower status in lineage than the husband, it does not make any difference in the validity of marriage with regard to *kafā'ah*.[56] A third report on his opinion reveals that Imām Aḥmad bin Ḥanbal also specified *salāmā min al 'uyūb,* that is, freedom from certain defects to be an element for *kafā'ah*.[57]

5.3 Elaboration of the factors of Equality According to the Ḥanafīs

The jurists of the *sunnī* Schools of thought have elaborated each of the factors of equality in various ways. Each of them has given different

[54]Ibn-i-Qudāmah, *Al-Mughnī,* 7:35.

[55]Abdul Rahmān bin Muhammad bin Aḥmad bin Qadāmah Al-Muqdasī, *Al-Sharḥ Al-Kabīr 'alā Matan Al-Muqanna'* (Beirut: Dār ul Kitāb al- 'Arabī lil Nashar wa Al-Tawzī', n.d.), 7:468.

[56]Ibn-e-Qudāmah, *Al-Mughnī,* 7:35.

[57]Ibid.

descriptions about the mentioned factors. As the research is more concerned and emphatic over the Ḥanafī opinion, the factors shall only be explained in the light of the Ḥanafī view.

A. *Dīn* (Religion)

All the Muslim jurists, both the *sunnī* and *shīʿah*, stipulate Islam to be a necessary condition for equality in marriage. It means that a Muslim woman can never be married to a non-Muslim. But there is a difference in their opinions regarding the notion of the condition of being Muslim. The Ḥanafīs like the other jurists are of the view that the Muslim by birth is preferred in equality to the one who embraced Islam later. The one who has converted into Islam is not equal to the one whose father was Muslim, as the honor among the clients is assessed on the basis of Islam.[58] They declare that the one whose father was/is not a Muslim is not equal to the one whose father was/is a Muslim. Similarly, if the grandfather of one was non-Muslim and the grandfather of the other was Muslim, the equality in religion does not establish. Imām Abū Yūsuf does not consider the difference of religion of the spouses' grandfathers as an element of inequality in religion. He is of the view that if the fathers of both spouses are Muslim, it is enough to establish equality of religion between them.[59]

B. *Nasab* (Lineage)

Equality in *nasab* or lineage is stipulated as an essential factor for equality in marriage by some jurists. The notion that the people of a certain lineage, area or tribe are superior to others is alien to Islam as the sayings of the Prophet have upheld the belief of equality of mankind and removed all discriminations of color, caste and creed. But the doctrine of equality in

[58]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:761.
[59]Ibn ʿAbidīn, *Radd al-Mahtār*, 2:319.

lineage is asserted due to the difference in behavior, culture and habits of the inhabitants of various areas and tribes, which would lead to incompatibility and difficulty between the spouses.

The Ḥanafīs insist on the presence of equality in lineage in the marriage as honor is linked to it. They proclaim that the *Quraysh* tribe is equal in status to the *Quraysh* and the Arabs are equal in status to the ʿArab. The *Quraysh* are superior to the other ʿArabs whereas all the other ʿArabs are superior to the *mawālī* (those descending from the non-ʿArab family of new converts to the Islam) and all the non-ʿArabs.[60] They take the following *ḥadīth* of the Prophet ﷺ as a source for this ruling:

> The *Quraysh* are equal in status sub-tribe by sub-tribe, the ʿArabs are equal in status tribe by tribe, and the clients are equal in status man for man.[61]

There is no preference of lineage within the *Quraysh* until the lineage is very honorable like that of the families of the Caliphs. With regard to such worthy families, lineage and tribe preference shall even be considered within the *Quraysh* to suppress the risk of *fitnah*. Wherever there would be any exposure to any kind of dishonor to the family, the equality of lineage would not establish. The *banū Bāhilah* tribe despite being ʿArabs are not considered equal in lineage to the ʿArabs in general for being well known for their notorious character and lower origin.[62]

This equality of lineage is required to procure the identity and honor attached to the certain tribe and family. As the woman incurs the name of the husband and her children would also carry the father's caste and lineage,

[60]Al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Mā'rifā, 1993), 5:25.
[61]Bayhaqī, *Al Sunnan Al-Kubrā*, Hadīth no. 13769.
[62]Al-Marghinānī, *Al-Hidāyah: The Guidance,* 2:760.

so if she is married to a person of lower tribe or family, her identity would automatically be devolved to her husband's lineage, and this would be an ignominy to the higher status of the woman's family. However, if the woman is married to a man belonging to a tribe of higher status than her, the equality in lineage is not disturbed as the fear of disgrace to the woman's family is eradicated.

C. *Ḥurriyah* (Freedom from Slavery)

Being free from slavery is also an essential factor of equality in marriage. A slave is not considered equal (*kufw'*) of a free woman. Even a freed slave is not considered equal to the originally free woman, as the honor of freedom by birth is not similar to that of subsequent freedom.[63] According to Imām Abū Ḥanīfah and Imām Muḥammad, the person whose one father was free is not equal in status to the one whose two fathers, that is, father and grandfather were free; and the one whose two fathers were free is not equal to the one whose more fathers (father, grandfather, great grandfather and higher so over) were free of slavery. But Imām Abū Yūsuf does not consider the grandfather's slavery as a factor of inequality.[64] The jurists have discussed many other aspects of slavery and freedom in equality of marriage like that of mother's freedom, minor's marriage with slaves etc., but as the concept of slavery does neither prevail in the current era and nor shall exist in the future, so it is not necessary to be discussed at length.

D. *Ḥirfah* (Profession)

Profession (also referred to as skills and craftsmanship) is also considered as a vital factor of equality by the Ḥanafīs. They assert that the profession of the husband should not be inferior to the profession, which the members

[63]Al-Kāsāni, *Badā'i' al-Ṣanā'i*, 2:319.
[64]Al-Marghinānī, *Al-Muḥīṭ al-Burhānī*, 3:22.

of the wife's family carry.[65] The views of Imām Abū Yūsuf and Imām Muḥammad clearly declare equality of professional status as an essential factor of *kafā'ah* but it is reported that Imām Abū Yūsuf added that the equality in profession is not to be regarded unless the profession of the husband is too lower than that of the wife's family; like that of a tanner, weaver or cupper.[66] However, contradictory opinions are attributed to Imām Abū Ḥanīfah in this regard.[67] According to one opinion, he does not consider profession as an element of *kafā'ah*, arguing that profession is not a compulsion and a person can elevate his profession from a lower to a higher type at any time he wishes.[68] According to another opinion, he considers it an essentiality of equality.[69] The argument given to support the equality in profession is that people hold pride due to the nobility of their professions and those holding lower professions are usually looked upon. Hence, a barber is not equal to the daughter of a tailor and a tailor is not equal to the daughter of a mercer or a merchant even if the barber is richer than the tailor's daughter or the tailor is richer than the merchant's daughter.[70] This is because the man would be famous in the community due to his profession and a lower profession of the man is likely to bring discredit to the wife's family and would lower their prestige.

E. *Diyānah* (Piety or Character)

Diyānah, that is, piety or character of the husband is specified as a separate condition of equality in some reports by the Ḥanafīs, whereas according to other reports, it has been dealt under the factor of *dīn* because it is also an indication of fear of Allah, commitment to the *dīn* and moral uprightness.

[65]Ibn 'Abidīn, *Radd al-Mahtār*, 2:321.
[66]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:762.
[67]Al-Marghinānī, *Al-Hidāyah*, 1:196.
[68]Al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Mā'rifā, 1993), 5:25.
[69]Al-Kāsāni, *Badā'i' al-Ṣanā'i*, 2:320.
[70]Ibn 'Abidīn, *Radd al-Mahtār*, 2:322.

Imām Abū Ḥanīfah and Imām Abū Yūsuf hold that if a pious woman marries herself to a *fāsiq* (disobedient) person, her guardians have the right to raise objection against the marriage contract because the pride of *dīn* and *diyānah* are higher than that of the lineage, wealth, and freedom. The standardization of piousness is a very important feature for establishing equality in marriage.[71] While Imām Muḥammad among the Ḥanafīs does not recognize *diyānah* as a condition for *kafā'ah*. He emphasizes that piety or character pertains to be a matter of the hereafter and the rules of the worldly affairs must not be imposed on it; unless he is *fāsiq* to such an extent that people and children make fun of him, or he gets slapped around or he goes out in the markets while being drunk. In this case, he cannot be considered a '*kufw'* of a woman belonging to a pious family because he is despised for his *fisq*.[72]

The Ḥanafī School agrees that if the father of a virgin woman marries her to a *fāsiq* or a drunkard or to one who earns *ḥarām*, she has the right to refuse acquiescence. She can approach the *qāḍī* and get her marriage contract annulled on his cognizance.[73] The *fāsiq* is not even equal to a woman who herself is not pious but her father is a pious man, and she belongs to a pious family. Some of the Ḥanafī scholars state that if the *fāsiq* is respectable and honored among people, then he can be considered equal to a woman of pious family.[74]

F. *Māl* (Financial Condition or Property)

The financial condition of the husband or the wealth he possesses is another factor which is regarded in *kafā'ah* by the Ḥanafīs. A poor man is not

[71]Al-Kāsāni*, Badā'i' al-Ṣanā'i*, 2:320.

[72]Al-Imām Kamāl ul-Dīn Muhammad bin 'Abdul Wāhid, *Sharaḥ Fataḥ ul Qadīr lil 'Ājiz al-Faqīr* (Beirut: Dār Aḥyā' al-Turāth al- 'Arabī, 1930), 3:192.

[73]Ibn Rushd, *The Distinguished Jurist's Primer*, 2:18.

[74]Ibn 'Abidīn, *Radd al-Mahtār*, 2:320.

equivalent in status to a rich woman because the prestige of wealth is commonly higher than other prestige. According to certain opinions of Imām Abū Ḥanīfah, Imām Abū Yūsuf and Imām Muḥammad, if he can afford to pay her the appropriate dower and can maintain her, then he is considered to be her equal; though, he might not possess wealth equivalent to that of her. But other reports show that Imām Abū Ḥanīfah and Imām Muḥammad inclined towards presence of equality in wealth stating that the people hold pride on the basis of wealth and are looked upon due to poverty. But Imām Abū Yūsuf does not take equivalence of wealth into account for its non-permanence.[75]

It is stated that the one who cannot afford to pay his wife's *mahr* and maintenance is not her *kufw'*. The *mahr* is considered to be the counter value or consideration of her physical submission and maintenance is necessary to fulfil her needs, so both must be paid essentially.[76] In reports, it is narrated that Imām Abū Yūsuf emphasizes on the capability of the man to maintain his wife and does not insist on his ability to pay the *mahr* because it can be paid in the times of ease. Moreover, a man may pay his wife's *mahr* from his father's wealth as well.[77] But the maintenance can neither be delayed, nor can the times of ease be waited for it, so its payment is crucial.

However, the prominent opinion of Imām Abū Ḥanīfah declares that the husband must be capable of paying prompt dower, must be able of conveniently maintaining his wife and must possess wealth equal to that of her or her father. If any one of these elements lacks, the husband is not considered *kufw'* to the wife.[78]

[75]Al-Kāsāni*, Badā'i' al-Ṣanā'i,* 2:319.
[76]Al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Mā'rifā, 1993), 5:25.
[77]Al-Marghinānī, *Al-Hidāyah,* 1:196.
[78]Al-Ḥanafī, *Al-Ikhtayār*, 1:99.

The condition of equivalence in wealth is stipulated to avoid the miserable marriages and unpleasant effects which are caused due to the inability of a girl brought up in luxury and comfort to adjust in limited means, insufficient facilities and financial hardships.

These are the factors, which must be essentially regarded for equivalence between the man and his wife to establish *kafā'ah* between them. The consequences of absence of *kafā'ah* are briefly discussed and the factors of *kafā'ah* are elaborated in the light of Ḥanafī school of thought. The other essential element which the Ḥanafīs prescribe and require for validating the marriage of a virgin woman without her guardian's consent is the stipulation of *mahr al-mithl*.

6. *Mahr al-Mithl*: The Appropriate or Reasonable Dower

Mahr al-mithl also known as appropriate dower, reasonable dower or proper dower is the amount of the customary dower, which is prevalent in the girl's family. It is specified according to the status and circumstances of the woman and is estimated according to the dower that has been paid to the woman's sisters, her paternal aunts or the daughters of her paternal uncles. If the mother and maternal aunts of the woman do not belong to her family tribe, her *mahr* cannot be estimated in the light of their *mahr*.[79] The woman's age, beauty, property, intelligence and religion also affect the determination of reasonable dower for her. The woman possessing more property, intelligence, beauty and younger age deserves increased reasonable dower.[80]

[79]Al-Marghinānī, *Al-Hidāyah*, 1:216.

[80]Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Rawalpindi: Federal Law House, 2012), 48.

If the dower fixed for the woman is less than the reasonable dower, the husband is not considered to be her equal. The matter of stipulation of dower less than that of appropriate dower can be discussed in two aspects in this context:

6.1 Marriage Contracted with Inadequate Dower by the Woman's Guardian

According to Imām Abū Ḥanīfah, if the father or paternal grandfather of a minor girl conducts her marriage contract for a dower too less than that of appropriate dower or too higher than it, the contract is binding on her. But if any other person has conducted such a contract for her, it can be set aside by the *qāḍī* on her objection.[81] But Imām Abū Yūsuf and Imām Muḥammad state that such a contract is not permitted and is invalid if the intensity of the increase or decrease is too high.[82] They argue that the basis of compulsion in the marriage conducted by the father or grandfather is the presumption that their acts are qualified to be in the best interest of the child; so if the contract depicts that it violates the best interests of the child, it loses its binding force and is void.[83] But Imām Abū Ḥanīfah disagrees to this by stating that the closeness of the father and grandfather establish the *dalīl* of their service in the betterment of the child. They might lower the dower for building up other objectives of the contract. However, the guardians other than these two do not carry the *dalīl* of welfare.[84] So, the girl can get her marriage dissolved on attaining puberty, if some other guardian has concluded her marriage contract with an inappropriate dower.

[81]Al-Marghinānī, *Al-Muḥīṭ al-Burhānī*, 3:45.

[82]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:764.

[83]Muhammad bin Muhammad bin Mahmood, *Al- 'Ināyah Sharḥ al-Ḥidayah* (Damascus: Dār al Fikr, n.d.), 3:303.

[84]Abu Muhammad Mahmood bin Ahmad bin Mūsā bin Ahmad bin Hussayn al-Ghītābī al-Ḥanafī, *Al-Bināyah Sharḥ al-Hidāyah* ((Beirut: Dār Kutub ul- 'Ilmiyyah, 2000), 5:120.

As far as the adult virgin woman is concerned, the Mālikīs and Shāfiʿīs not regarding *mahr al-mithl* as a part of *kafā'ah,* allow the father to contract his daughter's marriage for an amount less than it. Conversely, Imām Abū Ḥanīfah holds the view that the adult virgin woman has right to refuse to marry if her father wants to marry her with an amount less than the *mahr al-mithl* because he considers it an essential ingredient for proportionality of status or *kafā'ah*.[85]

6.2 Marriage Contracted by an Adult Virgin by Agreeing upon Inadequate Dower

When an adult virgin woman conducts her marriage without her guardian's consent for an unreasonable dower, then according to Imām Abū Ḥanīfah, the guardians have a right of objection. They may either get the dower raised up to the amount of *mahr al-mithl* or they might get the contract dissolved on this ground.[86] The logic behind this right of objection is that this act of the woman might adversely affect the other women of the family because the fixation of lower dower might be quoted as a standard for the women who have to marry after her. This shall also affect the prestige of the woman's family.[87]

Imām Abū Ḥanīfah argues that the guardians possess pride of higher dower, and the elements of importance and respectability are attached to higher amount of dower and its reduction may bring disgrace to the family. He adds that low dower also constitutes inequality, rather it is more objectionable because her dower would be standardized for the subsequent marriages of her family's women. Thus, it would cause harm to the whole tribe by lowering its standards of dower. This is contrary to the

[85]Ibn Rushd, *The Distinguished Jurist's Primer*, 2:19.
[86]Al-Sarakhsī, *Al-Mabsūṭ*, 5:13.
[87]Ibid, 5:14.

relinquishment after marriage, which causes no harm to the family's standards; rather the later relinquishment is considered an act of graciousness and morality. Conversely, stipulating low dower at the time of conducting the contract is witnessed by many people, hence, deeming it as the standard dower of the woman's family.[88]

7. Analysis of the Case Law

In Pakistani legal framework the Hanafi school seems to have a predominant position and the same is evident in the family law matters particularly the case law till date. As it is being contended that Pakistani courts have adopted selective interpretation of the Islamic legal rulings, here some of the leading cases are being mentioned. The first judgement being mentioned here is Hafiz Abdul Waheed *versus* Asma Jehangir or as commonly known Saima Waheed case.[89] This is the leading case of Pakistani legal history and may be termed as the landmark judgement which changed the course of judicial history on the matter of consent of walī in Pakistan. This case disposed-off two petitions. In the first case, Saima Waheed contracted marriage and took refuge in a shelter called *Dastak* which was being administered by Asma Jahangir, the leading human rights activist. Saima Waheed married without her father's will. She was forced to marry an older man, but she eloped with the tutor of her younger brother. Afterwards she remained in the *Dastak* while the petition was filed for her custody to be granted to her father.

Second appellant was Muhammad Iqbal who married Shabina Zafar. Shabina's father lodged an FIR against Muhammad Iqbal that he had illicit relations with his daughter. While Shabina maintained she contracted

[88]Fakhr ud Dīn al-Zaylī'ī Al-Ḥanafī, *Tabyīn al-Ḥaqāyq Sharaḥ Kanz al-Daqāyq wa Ḥāshīyat al-Shilbī*, (Cairo: Al-Matba'ah Al-Kubrā Al-Amīriyyah, 1895), 2:130.

[89] Hafiz Abdul Waheed vs. Asma Jehangir, PLD 2004 SC 219.

marriage with her own free will. The court joined these petitions as the question of law was the same. It was held that no habeas corpus writ is applicable. The court was of the view that an adult Muslim female can enter marriage and consent of *walī* is not required. It is to be noted here that this opinion is based on the Hanafi school but the requirement of doctrine of *kafā'ah as* described in detail above have been neglected altogether. Whereas in both petitions the inequality in terms of profession, financial and social status is evident and the right of objection to the *walī* has been eroded altogether.

Another significant case is *Mauj Ali versus Safdar Hussain Shah.*[90] Here the supreme court held that if an adult Muslim girl solemnized her marriage by her own free will she is competent to do so. The status of her marriage is valid and does not depend on the consent of the *walī*. In this case the father of the girl filed the petition for the custody of the girl which was declined by the apex court.

In Gul Khatoon versus Haji Muhammad Aslam[91] the same issue of validity of marriage of *sui juris* woman was addressed. The petitioner registered an FIR on the pretext that his daughter has been abducted by the respondent. Whereas it was later revealed that the girl eloped with the respondent who was her fiancé as well. The girl was an adult and married with her free will and consent. It was held that the contract of marriage by a *sui juris* Muslim woman without the consent of her *walī* has no effect on the validity. Another significant case to be mentioned here is judgement of Federal Shariat Court, commonly known as the Imtiaz case.[92] In this case the same matter was addressed by the court. The apex court's remarks while deciding the case are very interesting as an analogy between the contract of

[90] Mauj Ali vs. Safdar Hussain Shah, 1970 SCMR 437.
[91] Gul Khatoon vs. Haji Muhammad Aslam, 2015 PCrLJ 193.
[92] Muhammad Imtiaz and Another vs. the State, PLD 1981 FSC 308.

marriage and contract of sale by an adult woman in the Islamic law was conducted. It was held that marriage conducted by an adult woman with free will has no effect of consent of *walī* nor objections by *walī* can have any impact.

While interpreting the law the court did focus on the issue of consent of adult women and the liberty as granted by Hanafi law to the female as a subject but the details of stipulation of marriage contract have been neglected. Moreover, the Islamic law treats the contract of marriage as a special contract which is not a counterpart to any commercial contract though it is not a mere sacred pact devoid of any legal essence, but it is not an ordinary sale deed as well. Further, if the liberty of Hanafi school for granting the validity to marriage by an adult woman is being appreciated then on what grounds the essentials for that validity have been ignored.

A close look makes it clear that Pakistan courts have never addressed the issue that the doctrine of *kafā'ah* has relevance, rather it is a key element in deciding the matter of consent of *walī*. It can be rightly said that the judicial authorities have interpreted and utilized the traditional legal ruling in a piecemeal manner. All the cases raising the questions of consent of *walī* have been decided on the same principles but not a single judgement addressed the essentials and jurisprudence of this very sensitive issue. This seems an anomaly of the law and a failure of the jurisprudential skills of the Pakistani judiciary. For a marriage to be valid all the requirements are to be completed which includes the requirements of *kafā'ah*. It is worth mentioning that this doctrine should not be considered as a bar on individual liberty rather it is a tool for social protection and a shield to ensure her steady transition via bond of marriage. The methodology of Pakistan courts seems random and a mere pick and choose from the legal tradition.

8. Conclusion

The exhaustive analysis of the traditional *fiqhī* rulings relevant to the issue of *sui juris* woman marrying herself without her guardian's consent depicts that there are many apertures, inadequacies, and discrepancies between the actual classical *fiqhī* rulings and the contemporarily applied practices in the courts of Pakistan. As the current court practices regarding the issue of adult virgin women's marriages have been based on and are in accordance with the state's established precedential laws, thus, it is assertively proposed that a thoroughly unambiguous and coherent statutory law shall be passed by the parliament in this regard. As the prevailing Muslim Personal law in Pakistan is mostly based on the Ḥanafī law, and same was claimed by the courts while declaring such marriages valid, so, it is indispensable that a uniform statutory law must be enacted in this regard, which must necessarily be in true and complete accordance with the Ḥanafī law, incorporating all of its conditions and prerequisites. The Pakistani courts have utterly ignored the compliance of prerequisites to validate such marriages. Hence, declaring and issuing absolute validity to the marriages conducted by adult women without guardian's consent through the trend of 'pick and choose' in the *fiqhī* rulings by our honorable courts has not only deteriorated the whole spirit of this law, but has also opened an extensive gateway for irregular marriages. The in-depth scrutiny of the actual Ḥanafī law regarding guardian's role, status of such marriages, the notion of *kafā'ah* and *mahr al-mithl* shall prospectively be quite beneficial for the legislative bodies to incorporate the true essence of rulings in statutory law (which can be unvaryingly followed) and consequently in its acquiescent implementation.

****